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No. 87-301

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

OPAL V. MITCHELL, AND WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioners,

v.

UNITED STATES OF AMERICA, AND BONNEVILLE POWER ADMINISTRATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondents (hereinafter the Bonneville Power Administration or BPA) and the Ninth Circuit have both sidestepped the principal issue in this case by making a fundamentally wrong assumption concerning the effect of the discretionary function exception of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a)-i.e., that it somehow vests in federal agencies immunized authority to define for themselves the scope of their duties in tort. According to the Ninth Circuit and the BPA, federal agencies may render inoperative otherwise mandatory tort duties, by affirmatively deciding to ignore them, in favor of observing less stringent, merely minimum regulatory standards.

The BPA advances this erroneous view on page 3 of its Memorandum in Opposition where, without citation of authority, it states:

> Of course, the protected decision to adhere to the FAA guidelines makes irrelevant the breach of any other applicable duty to warn.

This is a remarkable concept—one totally foreign to the FTCA and tort law principles. It not only assumes a protected status for a decision to forego a mandatory duty, it also effectively elevates minimum regulatory standards to the maximum tort standards against which the conduct of agencies of the United States may be measured. It thus allows federal agencies to negate the principle set forth in Restatement of Torts (2d) § 288(c):

> Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.

The decision below rests upon the same erroneous assumption. The Ninth Circuit assumes that a decision by a federal agency to ignore an otherwise mandatory tort duty is protected by the discretionary function exception of the FTCA. (Pet. App. A3-A4). The only rationale offered by the Ninth Circuit for this view is an inapposite one. The Court below simply states, "Negligence * * * is irrelevant to the discretionary function issue." (Pet. App. A3). We readily acknowledge that the exercise of a discretionary function is immunized from liability under 28 U.S.C. § 2680(a), whether or not the discretion involved is abused. But reciting this principle begs, not answers, the question of whether a decision to ignore a mandatory tort duty is a protected discretionary decision in the first instance.

Presumably, neither the Ninth Circuit nor the BPA would openly assert that the FTCA imposes liability on a federal agency when it breaches a mandatory tort duty, but frees that same agency from liability so long as it first affirmatively decides to ignore the duty. Yet, that is the very essence of the decision below and the basis upon which the BPA attempts to cloud the conflict between this case and the Eighth Circuit's decision in *Aslakson v.*

United States, 790 F.2d 688 (8th Cir. 1986). The BPA suggests that the feature distinguishing the instant case from *Aslakson* is that unlike the federal agency in *Aslakson*, the BPA is immune from liability for otherwise actionable negligence because it preceded that actionable activity with an affirmative decision to engage in it. This premise is not only rejected by *Aslakson*, it also is explicitly rejected by the Tenth Circuit in *Smith v. United States*, 546 F.2d 872 (10th Cir. 1976), a second decision in clear conflict with the Ninth Circuit holding below. In *Smith*, the Tenth Circuit recognized that acceptance of the same argument advanced here by the BPA would effectively insulate the federal government from liability in tort. As the Tenth Circuit stated:

> If we were to accept the Government's broad interpretation of the discretionary exception, it is difficult to perceive which duties under tort law could not be avoided by a similar policy decision to ignore them.

Smith, supra 546 F.2d 877.

This is not, as the BPA endeavors to paint it, a narrow fact-specific case. The primary issue raised here extends far beyond the instant case and strikes at the heart and scope of the discretionary function exception of the Federal Tort Claims Act.

The Ninth Circuit, in a decision that puts it at direct odds with several other Circuits, has effectively appointed federal agencies as the final arbiters of their own tort liability. This conflict and fundamental error should be reviewed by granting our petition for certiorari.

Respectfully submitted,

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